Supreme Court, U.S.
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No. 03-1018

In The
Supreme Court of the United States

STATE CONCERN TURKMENNEFT,

Petitioner,

v.

BRIDAS S.A.P.I.C.; BRIDAS ENERGY INTERNATIONAL, LTD.; INTERCONTINENTAL OIL & GAS VENTURES, LTD.; BRIDAS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in applying a manifest disregard of law test that asked whether "the arbitrator understood the existence of a governing legal principle but decided to ignore it."

2. Whether an arbitration panel's factual determination of a discount rate was in "manifest disregard of law," when Petitioner cannot cite any governing law that the panel disregarded.

STATEMENT PURSUANT TO RULE 29.6

Respondents' parent companies are Ambas Holding Limited; Bridas Energy Investments Ltd. (also a Respondent); Energy Holdings International Ltd.; Associated Petroleum Investors Ltd.; Intercontinental Investments Holding Ltd.; and Intercontinental Energy Investors Ltd. No publicly held company owns 10% of Respondents' stock.

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OPPOSITION TO PETITION FOR CERTIORARI

Respondents Bridas S.A.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil & Gas Ventures Ltd., and Bridas Corporation (collectively, "Bridas") respectfully oppose the petition filed by State Concern Turkmenneft for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 345 F.3d 347 (5th Cir. 2003). The opinion of the district court is unreported.

COUNTERSTATEMENT OF THE CASE

A. Introduction.

Petitioner urges this Court to grant review to resolve a purported circuit split regarding the meaning of the manifest disregard of law standard, a nonstatutory ground for vacatur introduced by this Court in *Wilko v. Swan*, 346 U.S. 427 (1953), *reversed on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), and confirmed in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).[1] Petitioner's request should be denied simply because this issue was neither pressed nor ruled on below.

Further, all circuits, with one exception, apply the same, traditional test: an arbitral award will not be vacated for manifest disregard of law unless it is clear

[1] Arbitral awards are very rarely vacated under this standard. Of the over 300 published cases we have found applying the manifest disregard standard, fewer than 10% have ordered vacatur on this ground.

from the record that "the arbitrator understood the existence of a governing legal principle but decided to ignore it." *Williams v. Cigna Financ. Advisors, Inc.*, 197 F.3d 752, 762 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000).

The only circuit that applies a different test is the Seventh Circuit, which recently introduced a new, extremely narrow standard: an arbitral decision is in manifest disregard of the law only when the arbitrator's award actually orders the parties to violate the law. *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001). While the Seventh Circuit is thus at odds with the rest of the circuits, this conflict is irrelevant here because Petitioner could not possibly prevail under this narrower standard of review. Petitioner seeks a broader standard than the one applied here.

Petitioner also argues that the Fifth Circuit's standard is more stringent than the remaining circuits' because it includes a second hurdle: even if an award is in manifest disregard of law, the Fifth Circuit has held it will not be vacated unless "significant injustice" would result. *Williams*, 197 F.3d at 762. But even if the Fifth Circuit's test were more onerous, that would not matter here: the Fifth Circuit did not reach the second hurdle because Petitioner failed to meet the first, traditional hurdle. Accordingly, even if this Court rejected the second hurdle, that would not change the outcome in this case.

Because Petitioner fails to show that it could have prevailed under any other circuit's manifest disregard test, the Petition poses an abstract question rather than a live case or controversy.

Petitioner also asks this Court to review the Fifth Circuit's application of the manifest disregard standard to the arbitrators' selection of a discount rate, which it claims was erroneous. This request should be denied because this Court does not review factual errors, and because no court reviews an arbitration panel's factual findings. In any event, as the Fifth Circuit properly held, Petitioner cannot

possibly show that the arbitrators manifestly disregarded governing law, because they are unable to point to any law that the arbitration panel disregarded in estimating a discount rate.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

B. The Agreement.

In 1993, Bridas entered into a joint venture agreement ("JVA") with a Turkmenian party formed and owned by the government of Turkmenistan ("Turkmenistan") and designated to represent Turkmenistan's interest in the joint venture. Over time, Turkmenistan replaced this party with a number of entities, the final one being Petitioner Turkmenneft. (Pet. App. 30a.) The parties formed a joint venture entity ("JVK") to develop oil and gas fields in southwestern Turkmenistan. (*Id.*)

In 1995, after Bridas had invested more than $200 million in JVK, Turkmenistan ordered Bridas to suspend work and prohibited Bridas from importing or exporting any gas or oil. (Pet. App. 31a; RE5:4697.[2]) A few months later, Turkmenistan and the Turkmenian party acted jointly to take over the JVK fields and oust Bridas from the joint venture. [BRE6:12630-12631.] In response, Bridas initiated arbitral proceedings against Turkmenistan and the Turkmenian party before the International Chamber of Commerce ("ICC"). (Pet. App. 31a.)[3]

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[2] References to the record are set forth in the same manner as in Bridas' brief in the court of appeals. In this brief, we use the following citation forms to the record below: "R" refers to the Record filed in the district court; "RE" refers to petitioner's Record Excerpts in the court of appeals, and "BRE" refers to Bridas' Record Excerpts in the court of appeals.

[3] The arbitration originally named as respondents the Government of Turkmenistan, or Turkmenistan, or the State of Turkmenistan, and

(Continued on following page)

C. Arbitral History.

Arbitration proceeded before a panel of three arbitrators over four years. The proceedings included 19 days of hearings, extensive legal briefing, numerous expert reports, and voluminous testimony concerning damages. (Pet. App. 32a.) The arbitrators issued four partial awards, applying English law pursuant to the arbitral provisions of the JVA.

In the first partial award, a majority of the arbitrators concluded that both Turkmenistan and the Turkmenian parties had repudiated the JVA. The arbitrators also determined that damages should be measured by a loss of bargain standard, using a multi-factored analysis that used a 10.446% discount rate to calculate the present value of Bridas' future losses.[4] (Pet. App. 32a.)

Contrary to Petitioner's representation that "[t]he arbitrators had heard no expert or other testimony supporting the rate they selected" (Pet. 20), the panel reached its discount rate decision only after considering the testimony of both sides' experts. As the panel explained:

> Both parties adduced evidence and made submissions concerning the appropriate discount rate to be used to assess the present value of the future income stream. [Bridas'] position was that 7.5% is appropriate. The [Turkmenian parties] contended for 19.1%. [Their] analysis was based on a fair market value approach which we reject, but in our opinion [Bridas'] rate is too low and does not adequately reflect risk and the

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the Ministry of Oil and Gas of Turkmenistan and Concern Balkannebitgazsenagat (then the Turkmenian party). The arbitrators subsequently added the newly-formed State Concern Turkmenneft, Petitioner here, as a respondent in the arbitration.

[4] The dissenting member of the panel would have used a discount rate of 15%. [R8:76.3:4560-4559.]

> provisions of the contract. The arbitrators conclude that a rate of 10.446%, which is the rate charged by [Bridas] to the [Turkmenian parties] on [Bridas'] FPC account, in the circumstances of this case reflects the reality of the factual context as of June 30, 1997, the notional date for the receipt of money, and the terms of the JV Agreement.

[RE5:4706.]

The methodology selected by the panel considered numerous risks, including those associated with initiating gas and oil production, and transporting gas and oil to market, as well as inevitable fluctuations in the prices of oil and gas and in interest rates. The discount rate chosen by the panel was supported by the testimony of one of the experts for the Turkmenian parties, who estimated rates between 9.6% and 12.6%, encompassing the 10.446% rate selected by the arbitrators. [R11:75.24:3951.]

In short, the arbitrators chose a discount rate between the rates urged by each side's experts and arrived at a rate within the range urged by the parties.

The Turkmenian parties disputed the arbitrators' determination of the discount rate, arguing it was too low. [RE7:4596.] The panel considered and rejected their arguments, explaining in its subsequent partial award that:

> Determination of the input numbers for a calculation of damages for loss of bargain is a question of fact which is a matter of judgment based on the evidence. . . . Although they consider it to be too high, the [Turkmenian parties] do not challenge the arbitrators' conclusion in the First Partial Award concerning the discount factor, but the [Turkmenian parties] say that it is too low and should be revised upward. . . .
>
> Having considered the evidence adduced and submissions made at the January and February, 2000 proceeding, the arbitrators see no reason to depart from their earlier assessment of the

> appropriate discount factor. It was higher than the non-risk discount factor advanced initially by [Bridas] and takes into account the various risks referred to by the parties in the evidence, including those that derive from a consideration of the production plan insofar as it delays or eliminates volumes of production.

[RE7:4594-95.]

The Turkmenian parties challenged the discount rate a third time before the panel issued its final award. The panel considered their arguments and once again rejected them:

> The arbitrators are criticized for referring to the non-risk rate advanced by [Bridas], but this merely illustrates the fact that the arbitrators were alive to the fact that risk did have to be taken into account and that they did so. Their judgment was that 10.446% was an appropriate rate.
>
> The [Turkmenian parties] repeat arguments concerning the long-term equity rate that were canvassed thoroughly previously. They did not agree with the rate expressed in the First Partial Award and disagree with it now. The arbitrators considered all submissions concerning the discount rate and the widely disparate positions of the parties. The resulting rate was and remains their judgment of the rate that is appropriate in the circumstances of this case.
>
> The conclusion [as to the present value of Bridas' lost income stream] is rooted in the positions taken by the parties, some of which were accepted and some of which were not, a consideration of the mathematical relationship which is revealed by a consideration of those positions and the opinion of the arbitrators as to what was a fair assessment of the present value. The resulting number is not a mathematical calculation. It was

> neither determined nor expressed as such. It is a conclusion of judgment that flows out of the arbitrators' consideration of the positions advanced by the parties. Those positions were themselves based on the estimates of experts, which derived from their judgments of a number of factors. The [Turkmenian parties] would have the arbitrators bound to accept completely the judgment of one set of experts and to reject completely the judgment of the other set of experts. The arbitrators were not required to do so and did not do so.

[RE9:5231-33.]

The panel thus repeatedly considered each side's evidence, expert testimony, and arguments, and provided a reasoned explanation for its rejection of Petitioner's arguments concerning the methodology it used to determine the discount rate.

D. Judicial History.

1. District Court Proceedings.

The Turkmenian parties asked the district court to vacate the award based, *inter alia*, on the arbitrators' selection of a 10.446% discount rate. They argued that the arbitrators had violated the FAA by failing to issue a reasoned award, by applying equitable rather than legal principles, by awarding punitive damages, by making a material miscalculation, and by "other misbehavior." (Pet. App. 50a-62a.) They also argued that the arbitrators' award was in "manifest disregard of the law." (Pet. App. 62a-64a.) The district court rejected all these grounds for vacatur.

The district court found that the Turkmenian parties failed to show the arbitrators' choice of a discount rate was in manifest disregard of law because they did not cite

> any "law" which the arbitrators manifestly disregarded other than a terse contention that the arbitrators "[r]endered an award far in

> excess of the actual damages permitted by the English law of contracts by failing to adjust for the probability that projected revenues would not be realized." The [Turkmenian parties'] vague reference to the "English law of contracts" [was] not otherwise reinforced with analysis in their motions.

(Pet. App. 63a, quoting Instr. No. 72, at 46.) The court further observed that the award demonstrated that the arbitrators *had* considered the issue of risk, as required by English law. (Pet. App. 63a-64a.)

2. Appellate Proceedings.

The Fifth Circuit Court of Appeals affirmed the district court's ruling upholding the arbitrators' selection of a discount rate.[5]

The court rejected the Turkmenian parties' argument that the panel had selected a discount rate in manifest disregard of law, *i.e.*, that "'the arbitrator[s] understood the existence of a governing legal principle but decided to ignore it.'" (Pet. App. 23a, quoting *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003).) The court cited the following test from *Williams v. Cigna Financ. Advisors, Inc.*, 197 F.3d 752, 762 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000):

> First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld.
>
> Second, where on the basis of the information available to the court it is manifest that the

[5] The court reversed the district court's ruling that Turkmenistan was a party to the JVA, and remanded for further proceedings on this issue, which is not relevant to the questions raised by the Petition for Certiorari.

> arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between the parties.

(Pet. App. 24a.)

The court determined that the Turkmenian parties failed to meet the first hurdle. Specifically, the court rejected the Turkmenian parties' argument that the arbitrators manifestly disregarded the law by "downplay[ing] or ignor[ing] market forces when setting the discount rate." (Pet. App. 25a.) The court first observed that selection of a discount factor is "a question of fact to be determined by the trier of fact." (Pet. App. 25a-26a.) The court next observed that the Turkmenian parties had failed to identify any law presented to the arbitrators that they disregarded: "[The Turkmenian parties] cite[] no English law that compels the use of a particular discount rate, or establishes a methodology for establishing the same." (Pet. App. 26a (footnote omitted).) Finally, the court observed that the arbitrators had "considered a variety of evidence and considered the factors that it deemed most appropriate for this particular income stream: the risk inherent in the venture, potential inflation, and the time-value of money." (*Id.*) Accordingly, the court held, "there is simply no merit to [the Turkmenian parties'] assertion that the arbitrators' selected discount rate cannot, as a matter of law, possibly establish present-value damages equivalent to the stream of revenues projected to have been lost as a result of the breach," (*id.*) and declined the Turkmenian parties' "request[] that this court second-guess the arbitrators' determination [of the discount rate]." (Pet. App. 25a.)

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT SPLIT AFFECTING THIS CASE.

A. Petitioner Waived Its Claim that the Courts Are Split on the Meaning of Manifest Disregard of Law.

Petitioner's claim that the circuits are split was not raised or addressed in the court of appeals or the district court. Indeed, Petitioner objected to Respondent's citation of other circuits' articulations of the manifest disregard standard, and insisted the court use the Fifth Circuit's version. (Turkmenneft's reply brief at 6-7.)

Petitioner's oblique and perfunctory reference in its Petition for rehearing en banc to "confusion" about the standard does not preserve the issue. The petition was summarily denied, and the issue thus never reached by the court. *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (declining to reach an issue that "was not raised or briefed below."); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below."); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."). The Petition should be denied for this reason alone. We nevertheless address the merits in an abundance of caution.

B. Petitioner Misconstrues the Law Concerning the Meaning of Manifest Disregard.

Petitioner contends that review is warranted because the circuit courts are "sharply divided" over the meaning and scope of the "manifest disregard of law" standard of review. (Pet. 2, 7-14.) Petitioner misconstrues the law.

Petitioner argues that commentators have "bemoaned" a "longstanding and apparently intractable conflict" among circuit courts, citing a handful of student

notes[6] and a 1996 law review article by Stephen L. Hayford, *Law in Disarray: Judicial Standards for Manifest Disregard of the Law*, 30 Ga. L. Rev. 731, 764-778 (1996). (Pet. 8-9.) Petitioner quotes a sentence from Professor Hayford's lengthy (110 page) article professing "concern" over the "oblique" reference to manifest disregard in this Court's opinion in *Wilko*, 346 U.S. 427, and "the subsequent lack of guidance from the Court as to its proper meaning and effect." (Pet. 8, quoting Hayford, *supra*, at 811-12.) But this cursory statement appears in a section of the article discussing the legitimacy of the manifest disregard standard on policy grounds.

In the section of his article discussing the meaning of the standard as applied by the circuits, Professor Hayford states that, while courts were at that time (1996) divided over whether to *adopt* the standard,[7] the courts using the

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[6] None of the notes support Petitioner's argument, although they purport to discuss confusion among the circuits. All four contain limited analysis of manifest disregard cases, cite to one another to support the thesis that confusion exists, and put a lot of emphasis on *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), which, as we discuss *infra*, contains loose language that has since been disavowed by the Second Circuit. *GMS Group, LLC v. Benderson*, 326 F.3d 75, 79 (2d Cir. 2003) (explaining that, in *Halligan*, "we could only conclude that [the arbitrators] had disregarded [the law], as any other explanation would strain credulity given the quantity and quality of evidence. . . . We reached this conclusion applying the traditional manifest disregard standard," and citing the following intervening decisions applying the traditional test: *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1215 (2d Cir. 2002); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002); *Pike v. Freeman*, 266 F.3d 78, 86 (2d Cir. 2001)).

[7] The split over whether to adopt the standard has since been resolved. After this Court overruled *Wilko* on other grounds in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), some circuit courts concluded that the manifest disregard standard was no longer viable, and declined to apply it. *See, e.g., Williams*, 197 F.3d at 757-58. A few years after *Rodriguez*, however, this Court confirmed the viability of the manifest disregard standard in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). In

(Continued on following page)

standard were in agreement over its *meaning*: "the case law indicates a general agreement among the circuit courts as to the meaning of the 'manifest disregard' of the law ground." Hayford, *supra*, at 776; *see also Advest, Inc. v. McCarthy*, 914 F.2d 6, 9-10 (1st Cir. 1990) (observing that the circuit courts that had adopted the manifest disregard standard applied essentially the same test although they phrased it differently).[8]

Professor Hayford's article thus does not support Petitioner's argument that there is a circuit split as to the meaning of the standard.

Further, Professor Hayford confirms this lack of conflict in a more recent article (which Petitioner does not cite), stating there is now "consensus among the federal appeals courts as to the general nature of the judicial inquiry called for in applying [the manifest disregard] ground for vacatur." Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 Geo. Wash. L. Rev. 443, 467 (1998). "[T]he federal

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the wake of that decision, the circuit courts uniformly adopted the manifest disregard standard. *E.g., Williams*, 197 F.3d at 758-59 (discussing its decision to adopt manifest disregard standard in light of "*First Options*' approval of the standard," and listing cases from other circuits having done the same).

[8] As the *Advest* court put it,

> [t]his standard of judicial review has taken on various hues and colorations in its formulations in this, and other, circuits. . . . Although the differences in phraseology have caused a modicum of confusion, we deem them insignificant. We regard the standard of review undergirding these various formulations as identical, no matter how pleochroic their shadings and what "terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice. However nattily wrapped, the packages are fungible." 914 F.2d at 9-10 (citations omitted).

courts of appeals [now] unfailingly commence their analysis with an incantation of the two-step . . . standard," *i.e.*, (1) the arbitrator was aware of a well-defined and clearly governing legal principle; and (2) the arbitrator nevertheless failed to apply it. *Id.* at 468.[9]

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[9] Numerous cases, including many just last year, confirm this. *See, e.g., Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990) (manifest disregard exists when the law is "so clear and the arbitrators' award so irreconcilable with it that the panel must have disregarded the law and embarked on a flight of fancy"); *Bull HN Info. Sys. v. Hutson*, 229 F.3d 321, 331 (1st Cir. 2000) (citing *Advest*); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003) ("A court will vacate an arbitral award on this ground only if '[it] . . . find[s] both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'") (citation omitted); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003) (court may vacate an arbitrator's decision when it "'evidence[s] a manifest disregard for the law rather than an erroneous interpretation of the law.'") (quoting *Local 863 Int'l Brotherhood of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 534 (3d Cir. 1985) ("'the arbitrator's refusal to accept the valid, unappealed judgment of a court of this state . . . constituted manifest disregard for the law.'") (citation omitted); *Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991) (award may only be reversed "'when arbitrators understand and correctly state the law, but proceed to disregard the same.'") (citation omitted); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003) ("Judicial inquiry under the 'manifest disregard' standard is . . . extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable."); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 847 (6th Cir. 2003) ("An award is in manifest disregard if '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.'") (citations omitted); *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003) ("An arbitrator's award 'manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.'") (citation omitted); *Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1133-35 (9th Cir. 2003) (discussing "traditional manifest disregard of the law standard"; "our task is to determine whether the arbitrators could have made the same punitive damages award without manifestly disregarding New York law"); *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir.

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Petitioner also cites a D.C. Circuit case, *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), in support of its assertion that the circuit courts "repeatedly have recognized that they are divided over the meaning and scope of the manifest disregard of law standard and that guidance from this Court is required." (Pet. 7-8.) In *Cole*, however, the court merely observed that the "circuits have adopted various formulations" of the standard, and proceeded to consider how to apply the standard in the context of collective bargaining agreements. *Cole*, 105 F.3d at 1486-87 (stating that "in this statutory context, the 'manifest disregard of law' standard must be defined in light of the bases underlying the Court's decisions in *Gilmer*-type cases," *i.e.*, "'to ensure that arbitrators comply with the requirements of the statute'") (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). The D.C. Circuit has since confirmed it follows the traditional test. *E.g.*, *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 706 (D.C. Cir. 2001) (holding that "to modify or vacate an award on this [manifest disregard] ground, a court must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it

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2001) ("'manifest disregard of the law clearly means more than error or misunderstanding with respect to the law,' and it requires a 'willful inattentiveness to the governing law'") (citation omitted); *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1337 (11th Cir. 2002) ("'to manifestly disregard the law, one must be conscious of the law and deliberately ignore it.'") (citations omitted); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 706 (D.C. Cir. 2001) ("to modify or vacate an award on this ground, a court must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.") (citations omitted); *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1366 (Fed. Cir. 2001) ("the district court's holding, that the arbitrators' written decision is 'adequate and certainly not "completely irrational" or in "manifest disregard of the law,"' clearly recognizes that the decision is not the product of the arbitrators' gross misconduct.").

altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." (Citations omitted.)

Petitioner also observes that the Seventh Circuit recently adopted a new, very stringent standard for manifest disregard: "an arbitral decision is in manifest disregard of the law only when the arbitrator's award actually orders the parties to violate the law." *Butler Mfg. Co. v. USW*, 336 F.3d 629, 636 (7th Cir. 2003) (citing *Watts*, 248 F.3d at 580). (Pet. 8.) This unique standard does not provide a ground for review, however, because it would not change the outcome in this case: Petitioner has not argued, and cannot argue, that the arbitrators ordered the parties to violate the law here.

Petitioner also claims that the Fourth Circuit uses a standard narrower than other circuits. According to Petitioner, the Fourth Circuit "allows reviewing courts to develop their own rationale for confirming an award even if the arbitrator's rationale cannot be reconciled with the governing law." (Pet. 9.) But the case on which Petitioner relies, *Apex Plumbing Supply Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir.), *cert. denied*, 525 U.S. 876 (1998), is not a manifest disregard case at all. The issue was not raised by either party. Petitioner quotes dicta from a footnote explaining why courts interpret arbitral awards narrowly. *Apex* does not set out the manifest disregard standard, to which it refers only in passing, but it does cite *Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225 (4th Cir. 1991). *Upshur*, however, adopts the traditional test, *i.e.*, an award "may only be reversed 'when arbitrators understand and correctly state the law, but proceed to disregard the same.'" 933 F.2d at 229 (citations omitted). Further, even if the Fourth Circuit did apply a narrower version of the manifest disregard standard, that would not help Petitioner, who requires a broader standard to have any hope of prevailing.

Petitioner then points to the Second Circuit's decision in *Hardy v. Walsh Manning Sec., L.L.C.*, 341 F.3d 126 (2d

Cir. 2003). (Pet. 10.) Petitioner acknowledges that the Second Circuit "consistently reiterates" the traditional standard, authorizing an award to be vacated for manifest disregard only if (1) the arbitrators "'knew of a governing legal principle yet refused to apply it or ignored it altogether,'" and (2) the principle was "'well-defined, explicit and clearly applicable.'" (Pet. 10, quoting *Hardy*, 341 F.3d at 129.) But Petitioner argues that "*in practice*[,] [the Second Circuit] is sometimes less restrictive." (*Id.* (emphasis added).) To support this contention, Petitioner quotes *Hardy*'s statement that the award "'contain[ed] a fundamental mistake of law,'" and claims that this is the standard the court used to decide the case. (*Id.*, quoting *Hardy*, 341 F.3d at 133.) Petitioner misstates the result in *Hardy*.

The Second Circuit did not vacate the award in *Hardy* or hold that a "fundamental mistake of law" would be a ground for doing so. To the contrary, a majority of the court in *Hardy* held that the arbitral panel *may* have acted in manifest disregard of the law by disregarding governing legal principles of *respondeat superior* of which it was clearly aware. 341 F.3d at 130-31. The majority remanded the case to the arbitral panel to clarify whether it had disregarded the principle of *respondeat superior*. *Id.* at 133-34 (citations omitted).

The majority also held that the panel's award was based on a mistake of law, but refused to vacate it on that ground, because "[v]oiding an award [on the basis of manifest disregard] 'requires more than a mistake of law or a clear error of fact finding.'" *Id.* at 133. *Hardy* thus stated and applied the well-established standard for manifest disregard.[10]

[10] Indeed, the Second Circuit has stated and applied the traditional test in about 50 cases. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003) ("since 1960 we have vacated some part or all of an arbitral award for manifest disregard in

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Petitioner then turns to the First Circuit, making the unremarkable observation that the First Circuit's application of manifest disregard conflicts with the Seventh Circuit's new, *sui generis* standard. (Pet. at 10-11.) As discussed above, the Seventh Circuit standard conflicts with that of all other circuit courts because it has adopted an approach that virtually abrogates manifest disregard as a ground for vacatur, while the other circuits continue to apply the traditional test. But, as noted above, the Seventh Circuit standard is irrelevant here because no party argues it should be adopted, since it would not change the outcome in this case.

Petitioner's effort to show that the First Circuit's approach conflicts with the traditional test is also unavailing. (*See* Pet. at 10-11.) Petitioner cites *Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234 (1st Cir. 1995), to support its argument that the First Circuit reviews arbitral awards for evidentiary error. But the *Prudential* court both stated and applied the traditional test for manifest disregard. *Id.* at 239 (holding that "arbitration awards are subject to review [for manifest disregard of law] 'where it is clear from the record that the arbitrator recognized the applicable law – and then ignored it' ") (quoting *Advest*, 914 F.2d at 9); *see id.* at 240-41 (refusing to revisit the merits of appellant's factual contentions).

The language quoted by Petitioner was taken by the *Prudential* court from the First Circuit's 1990 opinion in *Advest*. Before stating the traditional test for manifest disregard, the *Advest* court reviewed earlier cases stating (without invoking "manifest disregard") that, "[i]n the main, a successful challenge to an arbitration award, apart from [FAA] section 10, depends upon the challenger's ability to show that the award is '(1) unfounded in

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. . . four out of at least 48 cases where we applied the [manifest disregard] standard") (quoted in *Hardy*, 341 F.3d at 130).

reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.' [Citations]." 914 F.2d at 8 (quoted in *Prudential*, 72 F.3d at 238.) "Put differently," the *Advest* court went on to say, "'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' *a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision.* [Citations.]." *Id.* at 8 (emphasis added). The *Advest* court concluded that the definitions of manifest disregard standard stated by different circuits were essentially "fungible." *Id.* at 10, *see* n.9, *supra*.

Read in the context of the *Advest* and *Prudential* decisions, the language quoted by Petitioner does not begin to suggest, as Petitioner claims, that the First Circuit uses a "fundamental mistake" standard, a "clear error" approach to fact-finding, or any other standard of review "rejected by other circuits." (Pet. 11.) Petitioner does not, because it cannot, cite any First Circuit decision applying the standards it attributes to that court.

Finally, Petitioner claims that the Fifth Circuit is stricter than some other circuits, *e.g.*, the Second Circuit, because it adds "an additional requirement" to the traditional test, "namely, that upholding the award would result in significant injustice." (Pet. 2; *see* Pet. 11, citing *Williams*, 197 F.3d at 762.[11]) Petitioner can point to no

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[11] *Williams* suggests that the following proposal "should prove helpful as a basis for articulating and applying the manifest disregard doctrine in the present context":

> First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld.

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Fifth Circuit case that has actually applied the "significant injustice" hurdle, but even assuming that the Fifth Circuit were to do so, the extra hurdle has no bearing on the decision reached here. In this case, the Fifth Circuit explicitly declined to reach the "significant injustice" hurdle because it had already concluded that Petitioner failed to clear the first, traditional hurdle, *i.e.*, Petitioner failed to show that the arbitrators manifestly acted contrary to governing law: "it is clear that [Petitioner] cannot satisfy the first prong of the manifest-disregard test. [Accordingly], we need not address the second." (Pet. App. 26a.) Thus, like the Seventh Circuit's standard, any difference between the Fifth Circuit's standard and that of other circuits is irrelevant to this case.

Petitioner makes a number of other groundless assertions in its effort to manufacture a relevant circuit split. First, Petitioner states the circuit courts are divided over whether the arbitrator's disregard must be intentional. (Pet. 11-12.) But none of the cases it cites supports this proposition. Indeed, all of the circuits that apply the test require an arbitrator's disregard of the law to be knowing or intentional. Whether or not they use the word "knowing" or "intentional," the circuit courts uniformly hold that an arbitrator's mistake or misinterpretation of the law does not constitute manifest disregard, which amounts to the same thing: the arbitrator's disregard of

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> Second, where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to relations between the parties.

197 F.3d at 762 (quoting Ian R. MacNeil et al., 4 FEDERAL ARBITRATION LAW § 40.7.2.6, at 40:95 (Supp. 1999) (footnote omitted)).

the law cannot be accidental but must be deliberate. *See* cases cited in n.9, *supra*.

Petitioner then cites *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), and *University Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331 (11th Cir. 2002), to assert that courts are divided over "whether the absence of a written opinion precludes or supports manifest disregard[.]" (Pet. 12.) These cases are not in conflict. In *University Commons*, the court considered the appellant's manifest disregard argument, but determined that in the absence of a reasoned opinion, or "any clear rule of law that the arbitrators might have transgressed," it could not vacate the award on that ground. 304 F.3d at 1337-38. In *Halligan*, by contrast, the court vacated the award even though there was no reasoned opinion, because there was overwhelming evidence in the record that the arbitrators manifestly disregarded a governing principle of law. 148 F.3d at 203-04.

The Second Circuit has since clarified that, while *Halligan* contains some loose language, it was based on "the traditional manifest disregard of the law standard." *GMS Group, LLC v. Benderson*, 326 F.3d 75, 79 (2d Cir. 2003) (citing the following intervening decisions that apply the traditional test: *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1215 (2d Cir. 2002); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002); *Pike v. Freeman*, 266 F.3d 78, 86 (2d Cir. 2001).) In *Halligan*, the court explained, "we could only conclude that [the arbitrators] had disregarded [the law], as any other explanation would strain credulity given the quantity and quality of evidence. . . . We reached this conclusion applying the traditional manifest disregard standard." *Id.* The court further noted that its discussion in *Halligan* "was confined to the unique concerns at issue with employment discrimination claims." *Id.* In any event, even if there were a split on whether the absence of a written opinion precludes or supports a showing of manifest disregard, there is no such issue in this case, because the arbitrators issued a lengthy written opinion.

Petitioner trots out *Halligan* again when it disingenuously asserts that two circuit courts have invoked a "manifest disregard of the evidence" standard. (Pet. 12.) Neither *Halligan* nor the other case cited by Petitioner, *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997), support this proposition. As noted above, the Second Circuit has since disavowed the loose language in *Halligan* and confirmed that it uses the traditional test. *GMS*, 326 F.3d at 79. In *Montes*, the Eleventh Circuit vacated an arbitral award not on evidentiary grounds, as Petitioner claims, but because it was clear to the court that the arbitral panel had consciously disregarded applicable law. 128 F.3d at 1461-62; *see id.* at 1459 (counsel for the prevailing party urged the arbitrators to ignore the Fair Labor Standards Act, which undisputedly governed the dispute, because "'*in this case this law is not right.*'") (original emphasis). Further, the Ninth Circuit has recently noted that "[m]anifest disregard of the *facts* is not an independent ground for vacatur in this circuit [or] any other circuit[.]" *Coutee v. Barington Capital Group, L.*, 336 F.3d 1128, 1133 and n.5 (9th Cir. 2003) (citing *GMS*, 326 F.3d at 79) (emphasis added).

Petitioner also claims that the circuit courts are split because two cases ostensibly hold that manifest disregard applies when an arbitral award is at odds with "the plain language of the contract." (Pet. 12, citing *Wonderland Greyhound Park, Inc. v. Autotote Sales, Inc.*, 274 F.3d 34 (1st Cir. 2001), and *Missouri River Servs., Inc. v. Omaha Tribe*, 267 F.3d 848 (8th Cir. 2001).) As the Second Circuit explained in *Westerbeke*, 304 F.3d at 220-21, the "plain language" or "essence of the contract test" derives from section 301 of the Labor Management Relations Act, not the FAA, and is not applicable to commercial cases. (Citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). Respondents have carefully searched and found only one circuit court case that even arguably uses a "plain language of the contract" test for manifest disregard in the context of commercial arbitration, namely,

Wonderland, 274 F.3d 34. There, the First Circuit held manifest disregard exists when "it is clear from the record that the arbitrator recognized the applicable law but ignored it," *or* "the award is contrary to the plain language of the contract." *Id.* at 36. However, the court went on to apply the traditional test to conclude there was no manifest disregard of law. *Id.* at 36-38.

The other case cited by Petitioner, *Missouri River Servs., Inc. v. Omaha Tribe*, 267 F.3d 848 (8th Cir. 2001), does not define manifest disregard in terms of plain language of the contract. Rather, it cites the traditional test for manifest disregard (which it did not apply), and refers to the essence of the contract in defining an alternative common law ground – "irrationality" – for vacatur. *Id.* at 854. In any event, this issue is also irrelevant, because Petitioner has never alleged that the arbitrators' decision conflicts with the plain language of the contract here.

Finally, Petitioner resorts to citing state court of appeals cases differing over whether the FAA requires them to adopt the manifest disregard standard. (Pet. 12-13.) This federal preemption question is completely unrelated to the issue raised by Petitioner here, namely, how the federal courts apply the manifest disregard standard. Further, this Court does not review the opinions of lower state courts. *See* Stern & Gressman, SUPREME COURT PRACTICE (8th ed. 2002), § 3.11, p. 163 (citing cases).

In sum, Petitioner fails to show any conflict between the manifest disregard standards applied by the circuit courts, with the exception of the Seventh Circuit's more rigorous test, which if applied here would not change the outcome of this case.

C. Petitioner's Case Is Not Justiciable because Petitioner Cannot Prevail Under any Circuit's Definition of "Manifest Disregard of Law."

Even assuming *arguendo* that there were cognizable differences among the circuit courts' definition or application

of the manifest disregard standard (as shown above, there are not), Petitioner's case does not present an appropriate vehicle for review of this issue. Petitioner does not show, or even argue, what standard should be applied here or that a different result would have been reached using another circuit's standard.

Article III of the Constitution confines federal courts to the adjudication of actual "cases" and "controversies." Here, Petitioner fails to state a justiciable controversy because it would not be entitled to relief in *any* circuit court, under *any* statement of the manifest disregard tests that it claims the various circuits apply. Indeed, Petitioner makes no contention to the contrary. Instead, Petitioner claims that it is entitled to prevail no matter what standard for manifest disregard is used. (Pet. 15 ["whatever the precise formulation, under any meaningful standard the arbitrators in this case manifestly disregarded the law."].) Thus, the question of the standard for manifest disregard is a wholly abstract and sterile one that presents no live case or controversy here. Petitioner seeks an advisory opinion on the meaning of manifest disregard that can have no impact on this case. This Court does not issue advisory opinions on abstract legal issues. *E.g.*, *Clinton v. Jones*, 520 U.S. 681, 699 (1997).

II. THE ARBITRATORS DID NOT MANIFESTLY DISREGARD THE LAW IN DETERMINING THE DISCOUNT RATE BECAUSE THAT IS A QUESTION OF FACT, AND BECAUSE THERE IS NO GOVERNING LAW THAT THE PANEL COULD HAVE DISREGARDED.

A. Determination of a Discount Rate Appropriate to a "Particular Income Stream" Is an Inherently Fact-Based Inquiry that Is Not Suitable for Review by this Court.

Petitioner argues that the arbitrators acted in manifest disregard of law by selecting a discount rate with

which it disagrees. (Pet. 16-21.) Petitioner does not dispute that determination of a discount rate "'is a question of fact to be determined by the trier of fact.'" (Pet. App. 25a, quoting *Huggs, Inc. v. LPC Energy, Inc.*, 889 F.2d 649, 657 (5th Cir. 1989) (citing *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988)). Indeed, Petitioner itself argued to the panel that selection of a discount rate is a question of fact, not law. [R9:75.6:4393.][12]

Instead, Petitioner tries to turn the arbitrators' factual determination of an appropriate discount rate into not just a legal error – which would not be reviewable[13] – but a manifest disregard of law. Petitioner argues that the rate selected is wrong for "'this particular income stream.'" (Pet. 17.) But Petitioner's emphasis on the necessity of selecting a rate for a particular income stream only underscores the fact-specific nature of the arbitrators' task. To select an appropriate discount rate for the peculiar set of facts at issue here, the arbitrators could not turn to an established formula, but had to weigh the evidence

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[12] It is well-established that this Court does not grant *certiorari* to review factual disputes in the ordinary case, let alone in the context of an arbitral decision. Supreme Court Rule 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-11 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. . . . [E]stablished law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision.").

[13] *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.").

and expert testimony and assess the risks over a 25-year period. As the record shows, this is exactly what they did.

Petitioner misconstrues the record to obfuscate this fact. For example, Petitioner states that the arbitrators "announced" their chosen discount rate before the contract was terminated, even though they had "heard no expert or other testimony supporting the rate they selected." (Pet. 20.) This implies that the arbitrators arbitrarily chose a discount rate without hearing or considering any evidence. To the contrary, the record establishes that the arbitrators did not select a discount rate until *after* they had heard and considered testimony from both sides' experts. As the arbitrators explained in the first partial award, "[b]oth parties adduced evidence and made submissions concerning the appropriate discount rate to be used to assess the present value of the future income stream. [Bridas'] position was that 7.5% is appropriate. The [Turkmenian parties] contended for 19.1%. Its analysis was based on a fair market value approach which we reject, but in our opinion [Bridas'] rate is too low and does not adequately reflect risk and the provisions of the contract." [RE5:4706.] Rather than adopt either side's estimates, the arbitrators explained, they "conclude[d] that a rate of 10.446%" was proper. [*Id.*]

The arbitrators further stated in their final partial award that they had considered the expert testimony and the risks at issue in arriving at the chosen rate as well as Petitioner's arguments opposing the rate:

> The conclusion [as to the present value of Bridas' lost income stream] is rooted in the positions taken by the parties, some of which were accepted and some of which were not, a consideration of the mathematical relationship which is revealed by a consideration of those positions and the opinion of the arbitrators as to what was a fair assessment of the present value. The resulting number is not a mathematical calculation. It was neither determined nor expressed as

> such. It is a conclusion of judgment that flows out of the arbitrators' consideration of the positions advanced by the parties. Those positions were themselves based on the estimates of experts, which derived from their judgments of a number of factors. The [Turkmenian parties] would have the arbitrators bound to accept completely the judgment of one set of experts and to reject completely the judgment of the other set of experts. The arbitrators were not required to do so and did not do so.

[RE9:5231-33.] Petitioner's suggestion that the arbitrators picked a number without hearing evidence is thus misleading.

Petitioner also inaccurately states (without citation to the record) that there was "undisputed evidence that a discount rate in the range of 19.1% was appropriate and represented a fair market value rate of return." (Pet. 20.) While one of Petitioner's experts testified that a 19.1% rate was appropriate, his opinion was certainly not "undisputed." As demonstrated by the passages above, Bridas' expert argued that a 7.5% rate was appropriate. Other experts, including Petitioner's, posited different rates.[14] Thus, the arbitrators heard evidence and decided the factual question of the appropriate discount rate. This factual question is not suitable for review by this Court.

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[14] *E.g.*, Petitioner's expert's 1/7/00 Revised Estimate of Damages at 16, R10:75.13:4163 (showing a range of possible discount rates from 14% to 23+%); Respondent's expert's 6/12/98 report at ¶ 75 R11:75.24:3951 (demonstrating that the opinion of Petitioner's expert placed Respondents' cost of capital between 12.1% and 15.1% on a nominal basis; adjusted for inflation this yields rates of 9.6% to 12.6%, encompassing the arbitrators' chosen rate).

B. Petitioner Can Point to No Law that the Arbitrators Disregarded, Consciously or Otherwise.

To establish manifest disregard, Petitioner was required to demonstrate that the arbitrators disregarded governing English law. But Petitioner did not and cannot do so.

Indeed, Petitioner itself informed the arbitrators that there is no English law compelling the use of a particular discount rate, or of a methodology for determining the rate: "A search of English cases failed to reveal any breach of contract cases that specifically address the proper method for determining a discount rate at which to discount anticipated future profits back to present value." [R9:75.6:4395.] Petitioner also directed the arbitrators to American cases for the proposition that "the selection of a discount rate is not a matter of law but rather a question of fact within the province of the fact finder." [*Id.* at 4393 (citing *Huggs, Inc.*, 889 F.2d 649); *see also id.* at 4392-4393 (noting that appeals courts "have upheld a wide range of discount rates selected by [a] jury on the ground that sufficient evidence in the trial court record supported the jury's decision").] Having correctly informed the arbitrators that there was no binding legal precedent and that selection of a discount rate was a question of fact within their discretion, Petitioner cannot now claim that the arbitrators' selection of the rate of 10.446% was in "manifest disregard" of the law.

The only English law to which Petitioner cites in its Petition consists of hornbook principles stating that (1) damages must be reduced to present value, (2) a present value discount must take into account the relative degree of risk entailed in a given enterprise, and (3) the victim of a breach should not be put in a better position than he would have occupied but for the breach. (Pet. 16, 18.) Petitioner fails to show that the arbitrators disregarded these principles, because (1) it is undisputed that

the panel ordered damages to be reduced to present value, (2) the record demonstrates that the panel took into account numerous risks in choosing a discount rate, and (3) there is no way to calculate lost future damages to an absolute certainty, so the arbitrators selected a discount rate within the "ballpark" of estimates supported by the evidence. Their decision was thus legally proper. *See, e.g., Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 546-553 (1983) (rejecting argument that future damages should be calculated or discounted according to an established rule of law, and observing that courts should not "embark on a search for 'delusive exactness because "[i]t is perfectly obvious that the most detailed inquiry [into lost future income] can at best produce an approximate result").

Since Petitioner cannot establish that the panel disregarded any governing law, it cannot establish that they did so "consciously." Petitioner nevertheless argues that the panel made a "conscious decision not to apply the law" because it repeatedly rejected Petitioner's arguments in favor of a different discount rate. (Pet. 19-21.) According to Petitioner, the panel's refusal to change the rate demonstrates that the arbitrators "felt boxed in" by their original decision. (Pet. 20.) This is pure speculation that cannot support a showing of legal error, much less a manifest disregard of law, even assuming there were a governing law at issue that could have been disregarded.

Petitioner's argument that the rate chosen by the arbitrators could not have been the "correct" rate because the parties applied the same rate to a loan in another setting simply does not turn a factual finding into a manifest disregard of law. The arbitrators' decision to "disregard" Petitioner's *argument* that they should have selected a particular rate is not by any stretch of the imagination a manifest disregard of law.

C. Petitioner's Oblique References to the Law of other Circuits Fail to Create a Ground for Review.

Petitioner cites to *Coutee*, 336 F.3d 1128, *Montes*, 128 F.3d 1456, and *Halligan*, 148 F.3d 197, to suggest that the Ninth, Eleventh, and Second Circuits would have applied the manifest disregard standard to vacate the arbitrators' fact-finding here. (Pet. 17-18.) As discussed in Section III, *supra*, however, none of these cases supports vacatur of an arbitral award on evidentiary grounds. In *Montes*, the Eleventh Circuit vacated an arbitral award because it was clear that the arbitral panel had consciously disregarded applicable law. 128 F.3d at 1459, 1461-62. *Halligan* too was based on "the traditional manifest disregard of the law standard." *GMS Group*, 326 F.3d at 78 ("[In *Halligan*], we could only conclude that [the arbitrators] had disregarded [the law], as any other explanation would strain credulity given the quantity and quality of evidence. . . ."). And in *Coutee*, the Ninth Circuit confirmed that the circuit courts do not review arbitral awards for manifest disregard of the facts, and declined appellant's invitation to reweigh the evidence. 336 F.3d at 1131-34.

The Ninth Circuit also confirmed in *Coutee* "the unexceptional proposition that a federal court will not confirm an arbitration award that is legally irreconcilable with the undisputed facts." *Id.* at 1134 ("In some circumstances, . . . legally dispositive facts are so firmly established that an arbitrator cannot fail to recognize them without manifestly disregarding the law."). However, Petitioner's case does not fit into this category. The only undisputed fact Petitioner points to is the fact that the discount rate selected by the arbitrators – 10.446% – was the same as the one used by the parties in a separate loan agreement. The fact that this rate was used in other circumstances, however, does not eliminate this rate from the universe of legally supportable discount rates appropriate here. As discussed above and in the panel's awards,

10.446% falls between the highest and lowest rates estimated by the parties' experts.

Finally, Petitioner argues it would have fared better in a circuit that does not allow arbitrators to award punitive damages when the contract does not allow them. (Pet. 19.) But the Fifth Circuit stated that it, too, would have vacated the award had the panel in fact awarded punitive damages. (Pet. App. 27a.) Instead, the court held, "there is simply no colorable argument that an award of punitive damages was embedded in the arbitrator's determination of the discount rate, given our conclusion . . . that the arbitrator[s] did not manifestly disregard the law in setting the discount rate." (Pet. App. 28a.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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